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August 23, 2019

Ex Parte Notice

Ms. Marlene H. Dortch
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Petitions for Declaratory Ruling Filed by BellSouth and Alabama 911 Districts Regarding the Meaning of the Commission's Definition of Interconnected VoIP in 47 C.F.R. § 9.3 and the Prohibition on State Imposition of 911 Charges on VoIP Customers in 47 U.S.C. § 615a-1(f)(1)*, WC Docket No. 19-44

Dear Ms. Dortch:

CenturyLink hereby responds to the latest filing from the Districts, which rehashes their prior arguments and attempts to cloud the issue.[1] The Commission can resolve the issues before it by declaring that Section 615a-1(f)(1) preempts state or local requirements that impose discriminatorily higher fees on VoIP services than on traditional telephone services. The Commission need not address individual state statutes or rules, and it need not revisit its definition of interconnected VoIP. By simply declaring that Section 615a-1(f)(1) preempts state statutes and requirements that impose discriminatorily higher 911 charges on VoIP services, the Commission can conclude this proceeding. Issues of implementation can be addressed by the states and localities or, if necessary, in the courts addressing the pending litigation over 911 charges.

VoIP Capacity Provisioning Is Not a License To Discriminate. The Districts repeat their arguments that any difference in service capacity or provisioning from a traditional telephone service justifies discriminatory 911 fees.[2] They focus on three factors that, they suggest, so differentiate VoIP services as to make them "fundamentally different" from

[1] *See* Letter from Brannon J. Buck et al. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 19-44 (filed July 23, 2019) ("Districts July 23 Ex Parte Letter").

[2] *See* Districts July 23 Ex Parte Letter at 5-11.

traditional telephone services and justify imposing higher total 911 charges on their users.[3] In reality, the Districts' chief concern seems to be that differences in VoIP provisioning would make 911 charge assessment "unworkable."[4] This is simply not the case, as demonstrated already in several states.

The Districts repeat their argument that "burstability," or the ability to increase capacity temporarily to deal with high volume, renders all VoIP services (whether they offer this feature or not) "fundamentally different" from TDM telephone services and not able to be assessed in a way that does not impose discriminatorily higher total charges on VoIP customers.[5] This is not a legal issue. It is an implementation question. The example the Districts provide in their most recent filing shows a Verizon service with "burstable" capacity. Yet the material the Districts provide plainly shows defined limits on simultaneous calling capacity – an additional 50 to 400 calling paths, depending on the underlying plan to which the customer subscribes. Should charges be assessed based on the number of lines in the subscription plan or on the number of lines in the additional temporary bursting capacity? The Commission need not decide this implementation detail. The taxing jurisdictions can make reasonable choices about how to assess 911 charges, so long as their methods do not impose discriminatorily higher amounts on VoIP providers.[6]

The Districts also now suggest that, when VoIP providers prioritize 911 calls to ensure that they are routed ahead of other traffic, they are distinguishing VoIP services—apparently as an entire class—from traditional telephone services and justifying higher 911 charges. They point out that a number of VoIP providers "give priority" to a 911 call even when all other paid-for capacity is in use or establish a separate route for emergency calling.[7] They apparently consider these features, like burstable capacity, to be insurmountable challenges in determining how to assess 911 charges. But these features - whether they are additional lines or simple traffic management or routing practices - can be evaluated within a nondiscriminatory 911 charge assessment regime and hardly justify discriminatory treatment for *all* VoIP services.

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[3] *Id.* at 5.

[4] *Id.* at 8.

[5] *Id.* at 6-7.

[6] The Districts also continue to argue that shared calling capacity across a business's multiple locations distinguishes VoIP from telephone services to the point where the subscribers are not similar classes of customers. *See id.* at 7-8. CenturyLink and others have already rebutted this argument in prior filings. *See* Letter from Matt Nodine, AT&T Services Inc., Joseph Cavender, CenturyLink, and Robert Morse, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 19-44, at 2-3 (filed July 11, 2019).

[7] Districts July 23 Ex Parte Letter at 8.

Finally, the Districts point to a few examples of over-the-top VoIP providers who appear to sell voice service by the number of minutes used rather than by line or capacity.[8] The Districts apparently believe that these services provide infinite capacity that poses insurmountable hurdles to nondiscriminatory 911 charge implementation. These services are quite different from the business-grade VoIP services that are the subjects of the litigation in the states. But in any event, there are analogies to these specific VoIP services in traditional telephone services (such as prepaid calling cards). As with burstability and 911 prioritization, there may be questions of implementation that the Commission need not resolve in order to conclude that states cannot discriminate in charging 911 charges on VoIP service.

The Districts' inadministrability argument fails in all events because multiple states *already* assess 911 fees in a nondiscriminatory manner. As AT&T explained in detail, multiple states already assess 911 fees based on "voice communication service connection," "voice channel capacity," or "service line,"[9] and more continue to do so.[10] These states have found regimes that rely on nondiscriminatory criteria to be not only administrable but good policy.

The Districts Mischaracterize Existing State Laws as Inherently Discriminatory. In response to AT&T's catalog of nondiscriminatory state laws, the Districts attempt to recast other states' laws as inherently discriminatory, in that they necessarily treat VoIP differently from traditional telephone services. They are wrong.

First, the Districts cite a law from Alabama that is *no longer in effect*.[11] Moreover, as AT&T already pointed out, a state court rejected the Districts' interpretation, holding instead that

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[8] *Id.* at 9-10. The example regarding Vonage is not from Vonage's website but a third party's website and we have been unable to find the same information anywhere on Vonage's website. Vonage's own website says that it "design[s] solutions to handle high call volume and automatic call rerouting, vital to your service if there's a problem on a circuit"—suggesting that it offers solutions for high call volume but not that it offers unlimited unpaid calling capacity. *See* Vonage Business, SIP Trunking, https://www.vonage.com/business/quality-of-service/sip-trunking/ (last visited Aug. 14, 2019).

[9] Letter from Matt Nodine, AT&T Services Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 19-44, at 2-3 (filed May 13, 2019).

[10] Letter from Matt Nodine, AT&T Services Inc., to Marlene H. Dortch, FCC, WC Docket No. 19-44, at 5-7 (filed Aug. 19, 2019) ("Districts August 19 Ex Parte Letter").

[11] Districts July 23 Ex Parte Letter at 11-12. The Alabama statute cited by the Districts, Ala. Code § 11-98-5, was amended effective October 1, 2013, and now requires a 911 charge on each "active voice communications service connection" capable of "accessing a 911 system." Ala. Act 2012-293 (amending Ala. Code § 11-98-5 and other provisions); Ala. Code § 11.98-5(a) (2019).

Alabama's prior 911 law required both VoIP and non-VoIP customers to pay 911 charges based on the extent to which the customer can make simultaneous calls to the PSTN (including 911).[12] In other words, the court interpreted the statute *not* to discriminate against VoIP providers.

Second, the Districts cite statutes in Florida and South Carolina where the providers are in active litigation disputing the discriminatory interpretation proffered by the plaintiffs. The Districts also cite the Idaho statute, which has similar language as the South Carolina law. Importantly, none of these statutes expressly assesses 911 charges on VoIP customers by telephone numbers alone, regardless of calling capacity. Both the South Carolina and Idaho statutes assess 911 charges on each VoIP telephone number with "outbound calling capability."[13] And the Florida statute assesses 911 charges on both standard exchange access and VoIP customers in the same manner, based "on the number of access lines having access to the E911 system, on a service-identifier basis."[14] The Commission's interpretation of Section 615a-1(f)(1) will serve as a helpful guide to the state courts in interpreting these statutes.

In sum, we are aware of no state statutes that unambiguously require discriminatorily higher 911 charges for VoIP services than for their traditional telephone service counterparts. There are discriminatory interpretations of those statutes, but the Commission can easily address this by declaring that any requirement—whether a statute, an interpretation of an ambiguous statute, an ordinance, regulation, or other requirement—that results in discriminatorily higher charges for VoIP service is preempted by Section 615a-1(f)(1).

Section 615a-1(f)(1) Evinces Congress's Clear Intent to Preempt Discriminatory State Laws. Finally, the Districts muddle the preemption issue at hand here. The Districts argue that the Commission lacks authority to preempt statutes that violate Section 615a-1(f)(1) because that

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[12] *See* AT&T's Reply Comments at 6, WC Docket No. 19-44 (filed April 12, 2019) (citing Order, *Madison Cty. Commc'ns Dist. v. ITC DeltaCom, Inc.*, No. CV 2014-904855.00 (Ala. Cir. Ct. Jefferson Cty. Apr. 25, 2018)).

[13] *See* S.C. Code § 23-47-10(38) (defining "VoIP service line" as "a VoIP service that offers an active telephone number . . . that has outbound calling capability."); Idaho Code § 31-4802(12) (defining "Interconnected VoIP service line" as "an interconnected VoIP service that offers an active telephone number…that has an outbound calling capability of directly accessing a public safety answering point."). Because all interconnected VoIP services—by definition—include the ability to make outbound calls, to be meaningful, the additional statutory reference to telephone numbers "with outbound calling capability" must refer to the number of concurrent outbound calls the customer can make.

[14] Fla. Stat. § 365.172(8)(1); *see also* § 365.172(3)(aa) (defining "service identifier" as "the service number, access line, or other unique identifier assigned to a subscriber and established by the Federal Communications Commission for purposes of routing calls whereby the subscriber has access to the E911 system").

statute does not include definitions of "class of subscribers" or "fee or charge." The Districts cite to the higher standard of clarity for preemption for certain state laws involving police or taxing powers.[15] But the Districts go too far. To begin with, their contentions that the state statutes at issue here are entitled to a heightened standard for preemption are incorrect.[16] Additionally, even if this were not the case, the Districts would read Section 615a-1(f)(1) to be incapable of preempting any state 911 requirements, no matter how discriminatory. Congress did express "clear and manifest" intent to preempt discriminatory requirements: Subsection (f) is entitled "State authority over fees" and provides that "[f]or each class of subscribers to IP-enabled voice services, the fee or charge may not exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications services."[17] Can the statute have no meaning because Congress did not define "class of subscribers" or "fee or charge"? The Commission has clear authority to interpret these terms as needed to fulfill Congress's clear direction that states may not impose discriminatory 911 charges.

In any event, no heightened standard for preemption applies here. Whether to assess 911 charges based on numbers or connections or some other methodology may be "an area traditionally regulated by the States," but it is hardly "a decision of the most fundamental sort for a sovereign entity."[18] "Fundamental" decisions address the structure and use of the state government itself, such as whether state judges must retire at a certain age,[19] whether the federal government can force states to regulate,[20] or whether the federal government can "re-allocate

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[15] *See* Districts July 23 Ex Parte Letter at 12-13 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).

[16] *See* Districts August 19 Ex Parte Letter at 4-5.

[17] 47 U.S.C. § 615a-1(f)(1).

[18] *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (noting that the Supremacy Clause of the U.S. Constitution provides "a decided advantage" to the federal government in the balance between federal and state authority, and that "[a]s long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States.").

[19] *Id.* at 456.

[20] *See New York v. United States*, 505 U.S. 144, 169 - 70 (1992) (declining to construe the Level Radioactive Waste Policy Amendments of 1985 as mandating that states regulate pursuant to federal standards for radioactive waste disposal because doing so would "commandee[r] the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program" (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981))).

decision-making power between the states and their municipalities."[21] As important as the regime for funding for 911 services may be, it is not a question of how the state has organized its own government.

Moreover, Congress's preemptive action here works in tandem with its directive in an adjacent sentence of the same provision. Section 615a-1(f)(1) also clarifies that states and localities may impose 911 fees on interconnected VoIP services (and others) "provided that the fee or charge is obligated or expended only in support of 9–1–1 and enhanced 9–1–1 services, or enhancements of such services, as specified in the provision of State or local law adopting the fee or charge."[22] Congress addressed the problem of 911 charge diversion and the problem of discriminatorily high fees on VoIP service in the same provision of the statute. This is sensible - higher than necessary fees encourage tax collectors to divert some of those funds to other purposes, thereby lessening the need for other forms of taxation. By ensuring that 911 charges for VoIP are no higher than those for similar TDM telephone services, Congress made it more difficult for taxing jurisdictions to overcollect from VoIP customers in order to support programs other than 911.

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The record on this issue is complete, and the Commission's task is straightforward. Congress already decided that states and localities may not impose discriminatorily higher 911 charges on interconnected VoIP services than on traditional telephone service. The Commission's task is to explain that the statute preempts inconsistent state laws, whether those laws facially discriminate against interconnected VoIP services or are implemented to have that effect. States remain free to adopt 911 charge regimes consistent with this basic requirement.

Respectfully,

/s/ Timothy M. Boucher

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[21] *Tennessee v. FCC*, 832 F.3d 597, 600, 610 (6th Cir. 2016) (holding that Congress did not provide the "clear statement" necessary to allow the Commission to "interpose itself" into the relationship between a state and its political subdivisions).

[22] 47 U.S.C. § 615a-1(f)(1).